that court denying the intervenor-defendant's motion for summary judgment (Pet. App. 8a-10a) is reported at 255 F. Supp. 466. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1967. The petition for a writ of certiorari was filed on July 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In a representation election conducted by the National Mediation Board where two unions were competing for the right to represent a craft of 400 employees, a majority of the craft (221) voted in favor of having one or the other union as a collective bargaining representative and a minority (179) signified their desire to have no collective bargaining representative by failing to cast valid ballots for any representative. Of those voting in favor of collective bargaining representation, 147 voted for one union and 74 voted for the other. The Board certified the union receiving 147 votes. Under these circumstances,

1. Did the district court have jurisdiction in an action against the Board to set aside the certification on the ground that the certified union failed to receive the votes of a majority of the craft? and,

2. If the district court did not have jurisdiction to set aside the certification, could the court properly decline to enforce the certification on the same ground in an action by the certified union to compel the employer to bargain?

STATUTE INVOLVED

Section 2, Fourth, 45 U.S.C. 152, Fourth, of the Railway Labor Act provides:

> *Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.*
>
> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions

payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2, Ninth, 45 U.S.C. 152, Ninth, of the Railway Labor Act provides:

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other

appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT

Petitioner, Aeronautical Radio, Inc., is an employer subject to the Railway Labor Act. In 1965, both the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "the Teamsters") and the Air Line Dispatchers Association, AFL-CIO (hereinafter "ALDA") sought to be certified as the collective bargaining representative of a 400-man craft of petitioner's employees (R. 40-41). After a hearing and findings by the National Mediation Board with respect to the appropriate craft lines (R. 41-42), the Board directed that a representation election be held (R. 11-13, 42). The ballots employed by the Board in the election contained a space to vote for the Teamsters, a space to vote for

ALDA, and a space in which the employees could write in the name of "Any Other Organization Or Individual" (R. 15). In addition, at the top of the ballot under the heading "Instructions For Voting," the employees were advised: "No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified" (R. 15).

A total of 221 employees voted for one or the other of the contesting unions and 179 employees failed to vote or cast void ballots (R. 17, 42).[2] Of the 221 voting for collective bargaining representation, 147 voted for the Teamsters and 74 voted for ALDA (R. 17, 42). Since a majority of the employees voted in favor of union representation and a majority of these voted for the Teamsters, the Board on October 25, 1965, certified the Teamsters as the duly designated and authorized representative of the craft (R. 16-17).

After the Board denied the petitioner's request to stay the issuance of any certification on the ground that certification of the Teamsters would be contrary to Section 2, Fourth, of the Act (R. 19-20, 25), petitioner filed a complaint in the district court against the Board, claiming that the certification was invalid (R. 3-10). The Teamsters intervened as a party, and filed a counter-claim and motion for summary

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[2] Under the Board's procedures, as indicated by the voting instructions to the employees contained on the ballots, failure to cast a ballot or casting a void ballot is treated as a vote against any collective bargaining representation. See, *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 669-670.

judgment against petitioner, seeking, *inter alia*, an injunction restraining petitioner from refusing to bargain with the Teamsters as the certified representative (R. 55-56). The district court declined to invalidate the certification and dismissed petitioner's complaint for lack of jurisdiction (Pet. App. 6a). However, the court refused to enforce the certification and denied the Teamsters' motion for summary judgment enjoining petitioner from refusing to bargain (Pet. App. 7a-10a).

The court of appeals unanimously affirmed the district court's dismissal of petitioner's complaint for lack of jurisdiction but held that the district court erred in refusing to enforce the Board's certification (Pet. App. 5a).

ARGUMENT

1. It is settled that determinations of the National Mediation Board in representation proceedings conducted pursuant to section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth, are not subject to judicial review unless (1) the Board has failed to exercise a duty imposed upon it under the Act, or (2) the Board has acted outside of its "jurisdiction," in "excess of its delegated powers and contrary to a specific prohibition in the Act." In *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, a certification issued by the National Mediation Board was challenged on the ground that the Board had misconstrued the Railway Labor Act by defining the craft or class in which the election was conducted on

a system-wide rather than a divisional basis. This Court expressly refused to discuss the question of statutory construction, holding that "the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate." *Id.*, at 300. After examining the statute and its history, the Court observed that Congress did not "place on the federal courts the burden of having the final say on any aspect of the [representation] problem." *Id.*, at 303. "The [Congressional] intent," the Court held, "seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.*, at 305.[3] And, more recently, in *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, involving a challenge to the form of ballot utilized by the Mediation Board, the Court reaffirmed the principle of finality of Board proceedings under section 2, Ninth, of the Act (*id.*, at 658-659). This Court went on to indicate that the only circumstances where a court is authorized to strike down certifications of the Mediation Board are where the Board has acted " 'in excess of its delegated powers and contrary to a *specific prohibition in the Act*' " (*id.*, at 659-660)[4] or where the Board has failed to perform its statutory duty to "investigate" the dispute (*id.*, at 661-662).

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[3] See also, *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336, and *General Committee* v. *Sou. Pac. Co.*, 320 U.S. 338.

[4] Quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188.

In the instant case, the court of appeals correctly ruled that neither of these circumstances was present (Pet. App. 3a-4a). The Board performed its statutory duty to investigate the dispute; it determined the appropriate craft, held an election in that craft, made findings regarding the result of that election, and certified the Teamsters as the bargaining representative. The principle that a court may require the Board to perform a statutory duty cannot, consistent with the *Switchmen's Union* and *Railway Clerks* cases, be converted into a license to review the manner in which the Board did perform its duty.

Nor was the Board's determination "in excess of its delegated powers and contrary to a specific prohibition in the Act." Petitioner argues (Pet. 9) that the Board's certification violates the provision of section 2, Fourth, of the Act, that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative" of the craft or class. However, as this Court stated in *Railway Clerks*, "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." 380 U.S. at 662. There is nothing in the legislative history of this provision to support petitioner's contention that Congress intended that an absolute majority of the employees must affirmatively indicate their support for a particular union before the Board could certify that union as the bargaining representative.[8]

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[8] The legislative history of the 1934 Amendments to the Act supports the view that such an indication of majority

The election procedures which have been utilized by the Board since its inception in 1934 represent a reasonable accommodation of the "majority rule" principle embodied in section 2, Fourth, of the Act, to situations where no single choice commands the support of the majority of the craft. The right of the majority to reject collective bargaining representation is preserved, for if fifty per cent or more of the craft fail to vote, no union is certified. On the other hand, where a majority of the employees cast valid ballots for various unions, the Board quite reasonably concludes that a majority favor collective bargaining representation;* and, if more than fifty

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support is not necessary. At the hearings Commissioner Eastman, the draftsman of the 1934 Amendments, was asked a number of questions concerning problems that might arise in connection with the conduct of elections. These included such questions as what the effect would be if a majority of employees failed to participate, and whether, for example, "[i]f only 40 percent of the total number of employees voted and 21 percent voted for a certain representation, that 21 percent then would speak the will of the 100 percent?" Commissioner Eastman's response to such questions was, in effect, that the proposed amendments did not provide the answers and that these were matters which the Board was to determine in connection with prescribing the procedures for the conduct of elections. See, Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., pp. 34-35. Petitioner's citation to page 57 of these Hearings (Pet. 9, fn. **) is misleading. Commissioner Eastman's testimony there does not relate to the point at issue here, but to the separate question of splitting crafts.

* The National Labor Relations Board at one time held the view that "where in an original election the combined vote for two labor organizations constitutes a majority of the votes cast, the employees have expressed a desire to bargain col-

per cent of those voting vote for one particular representative, that representative is certified. This is not inconsistent with the majority rule principle, for the certified union represents the choice of an absolute majority of those employees favoring representation.[7] While other procedures involving a different set of presumptions or inferences might be employed,[8] the Board's procedures, with the inferences the Board draws, are not arbitrary or unreasonable. As this Court concluded in *Railway Clerks* with respect to the type of ballot employed by the Board (380 U.S. at 671):

> The very nature of the arguments indicates that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board. These are matters for Congress and the Board rather than the courts. Here the Board—a creature of Congress

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lectively through some representative." *National Labor Relations Board* v. *Standard Lime & Stone Co.*, 149 F. 2d 435, 439 (C.A. 4), certiorari denied, 326 U.S. 723, citing National Labor Relations Board Fifth Annual Report, p. 60. The fact that the National Labor Relations Board has changed its procedure does not warrant the conclusion that the prior practice was arbitrary or unreasonable.

[7] If no one representative gets more than fifty per cent of the votes favoring collective bargaining representation, a run-off election is held. See, 29 C.F.R. 1206.1(a).

[8] See, *e.g.*, *Virginian Ry.* v. *Federation*, 300 U.S. 515, 560; *Railway Clerks* v. *Employees Assn.*, *supra*, 380 U.S. at 670; *National Labor Relations Board* v. *Standard Lime & Stone Co.*, *supra*, 149 F. 2d 435.

> —has been, as we have said, careful to provide fair, yet effective procedures and we feel certain that it will continue to do so. If its decision on the ballot is not acceptable, the place to go is to Congress, not to us.[9]

2. There is no merit to petitioner's contention that, even if the Board's certification of the employees' representative is not subject to challenge in the district court, the court may nevertheless refuse to enforce the employer's duty to bargain with that representative if it considers the certification to have been improper. Section 2, Ninth, of the Act, after setting forth the Board's duty to resolve representation questions and to certify the name of the representative to the carrier, provides:

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[9] The Board's practice at issue in the instant case was specifically challenged in *Railway Clerks* (Brief for Petitioner United Air Lines, Inc., in the Supreme Court, No. 139, October Term, 1964, pp. 51-54). The question was briefed by us although we also pointed out that no election had yet occurred (Reply Brief for the National Mediation Board and its Members, in the Supreme Court, Nos. 138, 139, 369, October Term, 1964, pp. 3-6). It may well be that in rejecting the challenge to the Board's procedures in *Railway Clerks*, the Court intended to dispose of the question at issue here, for it stated (380 U.S. at 670):

> The Board's rule of election procedure is that no vote is a vote for no representation, and this is now made plain to the voting employees. It is, as we have said, an assumption more favorable to the employees that the Association represents. Thus, under the Board's practice a majority of the craft or class, as required by § 2, Fourth, does have the right to determine who shall be the representative of the group or, indeed, whether they shall have any representation at all.

> Upon receipt of such certification the carrier *shall treat with the representative so certified* as the representative of the craft or class for the purposes of this chapter. [Emphasis supplied.]

Thus, the carrier's duty is not to bargain with the representative which it or a court might believe to be the true representative of the employees. Rather, the carrier is under a mandatory duty to "treat with the representative so certified." In a situation where the certification cannot be invalidated under the standards of the *Switchmen's Union* and *Railway Clerks* decisions, the carrier *must* bargain with the certified union under the clear language of the statute. The Act leaves no room for a court of equity to exercise discretion and excuse a carrier from refusing to bargain on the ground that the certification was improper under circumstances where the certification itself is immune from judicial invalidation.

Any other ruling would frustrate one of the principal purposes of the Act—to have representation disputes settled promptly so as to prevent any interruption to commerce.[10] The refusal of a court to en-

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[10] See, *Switchmen's Union* v. *Board*, *supra*, 320 U.S. at 302-303, where the Court referred to Commissioner Eastman's view that "it was very important 'to provide a neutral tribunal which can make the decision and get the matter settled.' " See, also, *Railway Clerks* v. *Employees Assn.*, *supra*, referring to the "major objective of the Railway Labor Act" as being " 'the avoidance of industrial strife, by conference between the authorized representatives of employer and employee' " (380 U.S. at 658) and to "the speed [in resolving representation disputes] which the Act's framers thought an objective of the first order" (380 U.S. at 668).

force the Board's certification will lead to a stalemate. The representation dispute, although in theory finally resolved by the Board, will actually continue because of the carrier's refusal to bargain with the certified representative. The Board will have no further authority, as it will already have certified the bargaining representative in the manner it believed to be proper, with the court having refused to invalidate that certification. Industrial strife, with an interruption in the nation's transportation industry, may well result from the continuing controversy among the carrier and its employees over the proper representative.

Moreover, the reasons underlying the Court's decisions in *Switchmen's Union* and *Railway Clerks* are just as applicable where the carrier challenges the Board's certification in an enforcement proceeding as where the certification is attacked in a suit against the Board to set aside the administrative action. Those decisions do not turn on the form of action;[11] they are based, rather, on the conclusion that Congress did not intend that courts should become involved in questions over how representation disputes should be resolved.[12]

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[11] Compare *American Federation of Labor* v. *Labor Board*, 308 U.S. 401, 406-411, and *Leedom* v. *Kyne*, *supra*, 358 U.S. at 187, involving the National Labor Relations Act.

[12] That it is the subject matter of the controversy and not the particular form of the litigation that limits the court's authority to become involved in the merits of representation disputes under the Railway Labor Act, is confirmed by the cases where the principles of *Switchmen's Union* were applied

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.[13]

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SEPTEMBER 1967.

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even though the suits were not brought against the Board to invalidate administrative action. See, *e.g.*, *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U.S. 338; *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (C.A. 2), certiorari denied, 373 U.S. 924. See, also, *Rose* v. *Brotherhood of Railway & Steamship Clerks*, 181 F. 2d 944 (C.A. 4), certiorari denied, 340 U.S. 851, where the court applied the principles of Switchmen's Union in a suit to enforce a certification.

[13] If the petition for a writ of certiorari were to be granted, we would argue, additionally, that since petitioner has no standing to participate in a representation proceeding before the Board (*Railway Clerks* v. *Employees Assn.*, *supra*, 380 U.S. at 666-667), it has no standing to bring an action to review the Board's certification.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 434

AERONAUTICAL RADIO, INC., *Petitioner*

v.

NATIONAL MEDIATION BOARD, ET AL., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Oppositions filed herein to the Petition for Certiorari are amply demonstrative of why certiorari should be granted.

Neither the Mediation Board nor the Teamsters appear to question the importance of the issues here presented to the administration of the Railway Labor Act. In fact, the Board recognizes the possibility that "industrial strife, with an interruption in the nation's

transportation industry may well result from the continued controversy among the carrier and its employees over the proper representative" (Brief of National Mediation Board, hereafter N.M.B., in Opposition, p. 14).

While noting that the controversy here is more accurately described as one over whether *any* representative should have yet been certified, we agree with the Board that industrial strife in the air transportation industry may inevitably result over this issue, unless the fundamental question of "majority choice" is now answered by this Court. Fortunately, in the instant case, both the respondent union and petitioner have conducted themselves in such a manner that no such strife or disruption has resulted. These circumstances, however, in no way alter the fact that the need for the resolution of this issue is both a critical and continuing one.[1] It cannot be passed off simply as a question of the "manner" in which the Mediation Board fulfills its statutory obligations or one of "methods and procedures." Congress has written a statute which states that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . ." The question here is not "judging" the manner in which the majority choice has been determined, but rather what is the ultimate meaning and statutory requirement resulting from this language.

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[1] The continuing nature of this controversy and its importance are well illustrated in a recent article. Hope, *"Majority Choice"—What Does It Mean?* 18 Lab. L.J. 515 (1967). The same considerations generated the participation of the Air Transport Association—representing the interests of an industry employing over 205,000 persons and operating under roughly 286 basic collective bargaining agreements—as *amicus curiae* below.

I. RESPONDENTS' INTERPRETATIONS OF THE STATUTE NOT SUPPORTABLE

The Oppositions merely argue the merits of respondents' respective conclusions (significantly arrived at through different processes) that the Board's action was consistent with *their* interpretation of the statute, and at any rate, that the judiciary is precluded from inquiry into Board certifications as long as certain *mechanical* steps have been taken by the Board.

The Teamsters claim that when Section 2, Fourth of the Act uses the word "majority" it "merely defines *the decision-making body.*" (Brief of International Brotherhood of Teamsters, hereafter IBT, in Opposition, p. 3) (emphasis in original). And that when this "decision-making body" has expressed a preference for one or more unions, the decision for unionization has been made, "the statutory requirements are exhausted," and the Board is thereafter free to choose "who" the representative of the class is to be.

Even assuming the validity of this new two-step theory (it has never even been mentioned by the Board), the Teamsters advance neither authority nor logical support for the further assumption, the *sine qua non* of their theory, that the "decision-making body" must be made up of *only the groups who voted for unionization* even though the largest single group voted for "no union." It seems clear that the only basis for this assumption is that the vote of those who prefer "no union" is somehow worth less than the vote of those who prefer "some union," a premise so radical that it fairly cries for clarification by this Court before it is endorsed, even by implication.

By contrast, the Mediation Board carefully declines to commit itself to any particular rationale in order to

support its conclusion in this case.[2] Rather, it merely claims that its procedures represent a "reasonable accommodation of the 'majority rule' principle embodied in Section 2, Fourth, of the Act" (Brief of N.M.B. in Opposition, p. 10). The core of the Board's argument is thus simply a flat denial "that Congress intended that an absolute majority of the employees must affirmatively indicate their support for a particular union before the Board could certify that union as the bargaining representative" (Brief of N.M.B. in Opposition, p. 9)[3] and that accordingly the statutory

[2] It is interesting to note that certifying the choice of the majority of those who want a union, rather than the choice of the majority of the craft or class, has been variously supported by the presumption that those who don't vote have agreed to be bound by the will of the majority of those who do vote, *Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515 (1937), later restricted by *Railway Clerks* v. *Employees Ass'n,* 380 U.S. 560 (1965); by arguing that workers "*just don't have a right to vote for no representation,*" *Ass'n for the Benefit of Non-Contract Employees* v. *National Mediation Board,* 218 F. Supp. 114, 125 (D.D.C. 1963) (emphasis in original); and by orally suggesting to the Court of Appeals in this case that it would not be unreasonable to apply the presumption that those who voted for the Airline Dispatchers Association would prefer the Teamsters to "no union." That the record in this case is still devoid of any indication of just how the Board reached its conclusion from the vote is illustrated by the ambivalent justification proffered by the Court of Appeals.

[3] No one, of course, makes such a claim. For example, the Board would have been perfectly free to presume that non-voters acquiesced in the choice of the majority of those who voted for some union, provided the eligible voters had some other way to indicate their "no union" preference, as would have been the case had the Board chosen to use a ballot with a "no union" box. Under those circumstances no one would reasonably argue that "an absolute majority of the employees must affirmatively" indicate their choice of the union to be certified, for under the principles of the *Virginian Ry. Co.*, the absolute majority could permissibly be made up of a composite of actual votes cast by the "majority of the majority," plus the presumptive votes of the non-voters.

requirements are satisfied by the certification of "the choice of an absolute majority of *those employees favoring representation.*" (Brief of N.M.B. in Opposition, p. 11) (emphasis added).

Both the legislative history and prior decisions of the courts are in conflict with the Board's position.

Thus, at the hearings on the 1934 Amendments to the Act, Congressman Pettengill specifically questioned Commissioner Eastman, the draftsman of the Act, as follows:

> "Mr. Pettengill. The reason I raised the question is that on page 6, line 7, the words are—
>
> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this act.
>
> I was wondering if that language would be accurate, because at an election a majority of the total number might not even participate.
>
> Commissioner Eastman. Well, that is a pertinent question. And, with that provision in paragraph 4, *I think the rules would have to provide for a majority of those who are determined to have the right to vote.* (emphasis added).
>
> Mr. Pettengill. And to participate in the election."[4]

The next day, the same question was raised again by Congressman Huddleston—with the same answer given:

> "Mr. Huddleston. There seems to be an ambiguity in the second sentence of this subsection fourth.

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[4] Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., p. 35.

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act.
>
> And, I am uncertain just what is meant by a majority. Does that mean a majority of all of the employees in the service of that particular employer?
>
> Commissioner Eastman. As it reads, I think it does, Sir."[5]

This colloquy demonstrates that both the draftsman of the 1934 amendments and the Congress[6] were well aware that the word "majority" in Section 2, Fourth, meant the majority of the entire craft or class, not, as now claimed by the Board, just of those who voted for some union.

Indeed, that the statute meant just what it said was confirmed by this Court in the *Virginian Ry Co.* case,[7] just three years later.

The question there was whether a union could be validly certified by the National Mediation Board when the actual ballots it received were less than a majority of the eligible voters. This Court squared the Board's

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[5] *Id.* at 57. The Mediation Board suggests that the citation to this colloquy in our petition was misleading. Brief of N.M.B. in Opposition, fn. 5. We stand on it, and invite the Court's attention to it.

[6] "The 1934 amendments to the Act were originally prepared and explained to the Congressional Committees by their author, Mr. Eastman, then Federal Coordinator of Transportation." *Switchmen's Union* v. *National Mediation Board,* 77 U.S. App. D.C. 264, 274, 135 F. 2d 785, 795 *rev'd on other grounds,* 320 U.S. 297 (1943).

[7] *Virginian Ry. Co.* v. *System Federation,* 300 U.S. 515 (1937).

certification in that case with the plain language of the statute by ruling that those who did not vote could be presumed to have consented to be bound by the vote of those who *did* vote.

The Court expressly recognized that "the words of the section confer the right of determination upon a majority of those eligible to vote . . ." but it permitted the construction of that majority through the combined use of these presumptive votes, together with actual votes, because the statute "is silent as to the manner in which that right [i.e., the right of the "majority of those eligible to vote"] shall be exercised."[8]

Therefore, in *Virginian* this Court in express language recognized that the word "majority" in Section 2, Fourth, meant "majority of those eligible to vote." Most significantly, however, it confirmed this meaning by its action, for if that language had meant what the Board now claims it means (i.e., a majority *of those who vote for a union*), there would have been no need whatever for the Court to articulate *any* presumption. Of course, it has now made it clear that this presumption is not available when the Board uses a ballot which precludes any written vote for "no union." *Railway Clerks* v. *Employees Association,* 380 U.S. 650, 669-70 (1965).

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[8] *Id.* at 560. Thus, the use of the presumption satisfies the intent of the Act ". . . to furnish a procedure whereby the employees of a particular craft or class could attain a representation by the organization which the *majority* of that craft or class desired." *Switchmen's Union* v. *National Mediation Board,* 77 U.S. App. D.C. 264, 275, 135 F. 2d 785, 796, *rev'd on other grounds,* 320 U.S. 297 (1943) (emphasis in original), while at the same time preventing the potential frustration of the designation of a representative by an indifferent or possibly coerced minority who did not cast actual votes.

II. THE BOARD'S NEW CLAIMS OF FURTHER IMMUNITY FROM JUDICIAL SCRUTINY REQUIRE CLARIFICATION BY THIS COURT

The true measure of the need for review by *certiorari* here is best illustrated by the extreme extrapolation of the statutory language which the Board finds necessary to support its position as well as by the Board's extravagant claims of near plenary immunity from judicial scrutiny under conditions heretofore never even contemplated by the courts or the Congress; and by its unqualified demand that the federal judiciary *must* make available the judicial injunctive power to enforce Board decisions, without the power to consider their essential legality.

Thus, the Board *now* insists that:

> "... the carrier's duty is not to bargain with the representative which it or a court might believe to be the true representative of the employees. Rather, the carrier is under a mandatory duty to 'treat with' the representative so certified.' In a situation where the certification cannot be invalidated under the standards of the *Switchmen's Union* and *Railway Clerks* decisions, the carrier *must* bargain with the certified union under the clear language of the statute. The Act leaves no room for a court of equity to exercise discretion and excuse a carrier from refusing to bargain on the ground that the certification was improper under circumstances where the certification itself is immune from judicial invalidation." (Brief of N.M.B. in Opposition, p. 13) (emphasis in original).

There is no question that the Board is claiming that the Railway Labor Acts gives it the right to take action in excess of its delegated powers and immunizes it from judicial review as long as it is not "contrary to a specific

prohibition in the Act,"[9] (Brief of N.M.B. in Opposition, p. 9); that the Act further precludes review as to the manner in which the Board has performed its duty to investigate and choose a representative—as long as it has performed a certain number of mechanical steps, (Brief of N.M.B. in Opposition, p. 9); that it empowers a private litigant (the certified union) to present evidence of that action (the certification) to a court of equity and in turn *compel* the court to issue its most extraordinary remedy in the form of a mandatory injunction *irrespective of the validity of the Board's action under law.*

This unprecedented claim is at once so sweeping and so at odds with the most fundamental precepts of due process and the nature of the judicial power that it defies detailed rebuttal within the practical limits of this reply.

Thus, we can only assert that the petitioner can and will, should *certiorari* be granted, demonstrate that no such power inheres in the Mediation Board; that the limitations of the *Switchmen's Union* and its companion cases[10] by their own terms are not applicable to this case since it involves neither a jurisdictional dispute between two unions nor the vindica-

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[9] The quoted limitation was borrowed from *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958) where it was applied to the scope of *direct* review of an N.L.R.B. certification, which is subsequently reviewable in related enforcement proceedings—and for that reason a limitation obviously inapposite here, where the agency also claims immunity from review in the enforcement proceeding.

[10] *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); *General Committee, B. L. E.* v. *Missouri K-T-R. Co.*, 320 U.S. 323, 336-337 (1943). *General Committee, B. L. E.* v. *Southern Pac. Co.*, 320 U.S. 338, 343 (1943).

tion of rights under the Railway Labor Act; that this Court has expressly declined to declare Board certifications immune from review in enforcement proceedings, *Switchmen's Union* v. *National Mediation Board,* 320 U.S. at 307; that this Court has affirmed lower courts specifically declaring National Mediation Board certifications invalid and refusing to enforce them, *Virginian Ry. Co.* v. *System Federation,* 300 U.S. at 559-562, *affirming System Federation* v. *Virginian Ry. Co.,* 11 F. Supp. 621, 625-626 (E.D. Va. 1935); that this Court has refused to deprive a district court of its discretion and to make mandatory the issuance of an injunction on the basis of administrative findings even where the statute has directed that where a violation exists an "injunction . . . *shall* be granted," *Hecht Co.* v. *Bowles,* 321 U.S. 321, 327 (1944) (emphasis added); and that nothing in the Railway Labor Act—or any statute—has vitiated the validity of the principles that "the supremacy of law demands that there shall be opportunity to have *some* court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly," *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936) (Brandeis, J. concurring) (emphasis added) and that *"the core of the judicial function where enforcement is in question is the determination of legality."* L. Jaffe, *Judicial Control of Administrative Action* 262 (1965) (emphasis in original).

CONCLUSION

For the foregoing reasons, and for those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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